No. 06-1027

In The
Supreme Court of the United States

ALFRED VILLADSEN,
DONALD and MARILYN VILLADSEN,
and JACK MICKEVICH,

Petitioners,

vs.

MASON COUNTY ROAD COMMISSION,
SHERMAN TOWNSHIP, DEPARTMENT
OF NATURAL RESOURCES, and
MASON COUNTY DRAIN COMMISSIONER,

Respondents.

On Petition For Writ Of Certiorari
To The Michigan Supreme Court

BRIEF IN OPPOSITION

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QUESTION PRESENTED

Does the Mason County Road Commission's compliance with the State of Michigan's Highway by User statute, Mich. Comp. Law Section 221.20, meet the notice requirement of the due process clause of the Fifth and Fourteenth Amendments to the United States Constitution?

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STATEMENT OF THE CASE

This lawsuit involves a portion of Darr Road, a road which runs north/south throughout much of Mason County, Michigan, over the course of many miles. The Petitioners filed suit to challenge public use as to a one mile portion[1] of this road, and Respondent Mason County Road Commission (MCRC) defended the road as having been created pursuant to highway by user.

Michigan's highway by user statute, MCL 221.20, reads as follows:

> Sec. 20. All highways regularly established in pursuance of existing laws, all roads that shall have been used as such for 10 years or more, whether any record or other proof exists that they were ever established as highways or not, and all roads which have been or which may hereafter be laid out and not recorded, and which shall have been used 8 years or more, shall be deemed public highways, subject to be altered or discontinued according to the provisions of this act. All highways that are or that may become such by time and use, shall be 4 rods in width, and where they are situated on section or quarter section lines, such lines shall be the center of such roads, and the land belonging to such roads shall be 2 rods in width on each side of such lines.

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[1] MCRC filed a third party and counter-complaint to have a longer, connected stretch of Darr Road declared a highway by user. The third party and counter-complaints were resolved during trial by the stipulation of Petitioner, and default judgments and consents to judgments filed by certain neighboring parties. The trial court determined that the portion of Darr Road referenced in the third party and counter-complaint was a highway by user.

The statute has been interpreted by Michigan courts as requiring the following: (i) a defined line, (ii) that the road was used and worked by public authorities, (iii) public travel and use for ten consecutive years without interruption, and (iv) open, notorious, and exclusive public use *Beulah Hoagland Appleton Qualified Personal Residence Trust v. Emmet Co. Rd. Comm.*, 236 Mich.App. 546, at 554-5, (1999).

A three-day bench trial was held regarding Petitioners' complaint. Following trial, the Mason County Circuit Court issued an opinion (attached at App. 22-50 of Petitioners' filing) finding that the portion of Darr Road complained of by appellant was also a highway by user.[2]

Following hearing, the Michigan Court of Appeals affirmed the decision of the trial court in a decision issued July 19, 2005. Rehearing in the Michigan Court of Appeals was denied on August 30, 2005. The decision of the Michigan Court of Appeals was approved for publication on September 27, 2005.

The Michigan Supreme Court affirmed the Michigan Court of Appeals on May 19, 2006, and Reconsideration was denied on October 31, 2006 (see App. 1-2, and App. 75-76 of the Petition, respectively).

Pursuant to Rule 15.2, specifically counsel's obligation to point out any perceived misstatement in this brief, MCRC states the following:

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[2] The trial court later conducted a hearing to determine the width of the subject one mile. This hearing is not relevant to the issue before this Court.

1. Petitioners state at page 3 that the subject one mile of Darr Road is identified as a "trail" pursuant to the legend of an official county maps. There is at least one official MCRC map which shows the subject property as a trail in its legend. Petitioners fail to explain that Gary Dittmer, manager and engineer of the MCRC, explained that roads identified as trails receive maintenance attention from the MCRC. Trial Transcript, page 215, lines 5-9. It would be a fallacy to suggest that because a road is identified as a "trail" it is somehow thereby not a legitimate right of way.

2. Petitioners' assertion at page 4 that the MCRC wants to keep the subject property as part of a "road bank" for future use is not supported by any statement from the MCRC. The only evidence of this contention is testimony from the local township supervisor. There is no evidence that the township supervisor has any role with regard to the MCRC.

3. At page 13, Petitioners rely on the Michigan Court of Appeals case of *Maghielse v. Crawford County Road Commission*, 47 Mich App 96 (1993), to suggest that MCRC's annual inspections that occurred from 1968-1987 over the subject property are not evidence of public work. Petitioners' analysis of this case is incorrect. In the *Maghielse* case, there was little if any additional evidence of public work beyond annual road commission inspections. *Maghielse* does not stand for the idea that yearly inspections by a road commission are not some evidence of public

work; rather, the case holds that there must be more, as in the matter at bar.

4. Petitioners, at page 19, suggest that the Mason County Circuit Court found a portion of the subject road impassible. This Court is commended to review App. 29-30 from the trial court's opinion. Nowhere does the opinion state that the road was impassible. Petitioners' assertion to the contrary is made up of whole cloth.

MCRC also notes that in contravention to the rules of this Court, the Petitioners have failed to include a statement required by Rule 14 1.(g)(*i*) showing where the federal question presented in this petition was raised in the Michigan trial court and appellate courts. Failure to timely raise a federal question in the trial and appellate courts below is reason enough to deny this petition, as this Court will not normally review a federal question which was not first reviewed by the state court. *Adams v. Robertson,* 520 U.S. 83 (1997). MCRC objects to review by this Court over matters not raised below pursuant to Rule 15.2, and as such, review of this matter should end there.

SUMMARY OF ARGUMENT

The thrust of Petitioners' argument is that the items of notice which the lower courts found as meeting Michigan's highway by user statute, MCL § 221.20, fail to meet the due process notice requirements in the Fifth and Fourteenth Amendments. MCRC maintains that review by this Court is not necessary in that (1) these issues were not argued below, (2) Petitioners fail to show how a conflict exists between decision of the Michigan Supreme Court

and a court of last resort in some other state or a United States Court of Appeals, and (3) Petitioners' arguments tend to relate to perceived misinterpretations of fact or misapplication of settled law.

REASONS FOR DENYING REVIEW

I. THE FEDERAL MATTER RAISED IN THIS PETITION WAS NOT RAISED OR DECIDED IN THE COURTS BELOW

Petitioners presented the following two questions at the Michigan Supreme Court:

1. MICHIGAN COURT OF APPEALS ERRED IN FINDING THAT THE SECOND AND THIRD ELEMENTS OF MCLA 221.20 EXISTED BETWEEN 1977 AND 1997 WNE THERE WAS NO EVIDENCE ON THE RECORD TO SUPPORT THE CONCLUSION.

and,

2. THE COURT OF APPEALS ERRED WHEN IT DECIDED THAT WORK PERFORMED OUTSIDE THE DISPUTED STRIP THAT DID NOT MAKE THE ENTIRE ROAD REASONABLY PASSABLE WAS SUFFICIENT TO MEET THE SECOND ELEMENT OF MCLA 221.20 IN CONFLICT WITH ESTABLISHED CASE LAW, INCLUDING ITS FINDING ONE WEEK EARLIER IN *CAMP V. MECOSTA COUNTY ROAD COMMISSION*, UNPUBLISHED OPINION PER CURIUM OF THE COURT OF APPEALS

DECIDED JULY 12, 2005 (DOCKET NO. 255154).

Not a word of the arguments made to Michigan's court of last resort had to do with whether the items manifesting public use and work under MCL 221.20 as decided by the trial court met the due process requirement for notice under the 5th or 14th Amendments.

As this Court stated in *Adams* at page 86,

> With "very rare exceptions," *Yee v. Escondido*, 503 US 519, 533, 112 S.Ct. 1522, 1531, 118 L.Ed.2d 153 (1992), we have adhered to the rule in reviewing state court judgments under 28 U.S.C. § 1257 that we will not consider a petitioner's federal claim unless it was either addressed by, or properly presented to, the state court that rendered the decision we have been asked to review.

The *Adams* decision also holds that when a matter has not been argued at the state court level, the presumption exists that the issue is not properly before the United States Supreme Court. The Petitioners may overcome this presumption by showing that the state court had a fair opportunity to address the issue raised at this Court. *Adams* at pages 86-87. The Petition contains no such analysis.

As the state courts had no opportunity to review the due process arguments raised by the Petitioners, and in keeping with the national interest in comity, the Petition for Writ of Certiorari should be denied.

II. THE PETITION FAILS TO SHOW A CONFLICT BETWEEN THE DECISION OF THE MICHIGAN SUPREME COURT AND THE COURT OF LAST RESORT FOR ANY OTHER STATE, OR ANY FEDERAL COURT OF APPEALS

While not limiting this Court's discretion, Petitions from a state court of last resort may lead to a writ of certiorari when the state court "has decided an important federal question in a way that conflicts with the decision of another state court of last resort or of a United States court of Appeals[.]" Rule 10(b). In the matter at bar, no comparison has been made between the decision of the Michigan Supreme Court to uphold the Michigan Court of Appeals and trial court's determination that the subject property was in fact a highway by user and the court of last resort of any other state or the United States Court of Appeals. As such, this Petition for Writ of Certiorari should be denied.

III. PETITIONERS' ARGUMENTS TEND TO RELATE TO PERCEIVED MISINTERPRETATIONS OF FACT OR MISAPPLICATION OF SETTLED LAW

Petitioners do not challenge whether MCL 221.20 is unconstitutional as a violation of due process. Rather, Petitioners argue that the decisions below finding compliance with MCL 221.20 on the part of the MCRC violate the notice requirement contained in the 5th and 14th Amendments.

Petitioners make several arguments in support of this contention. The strongest argument is what Petitioners call "third-party notice." MCL 221.20, and the decisions which have interpreted it, requires (in part) that there be

work performed on the subject road by public authorities. *Beulah Hoagland Trust* at 554-5. Decisions from the Michigan appellate courts will allow work performed on a part of a road to substantiate the requirement that work be performed on the portion of the road at issue. In other words, on a road like Darr Road, which traverses a large part of Mason County, Michigan, work performed on a portion of the road some distance away from the disputed part of the road could be used to substantiate the work element for the entire road.

While there was work performed on other parts of Darr Road that did lead the lower courts to accept that the requirements of MCL 221.20 were met, the trial court's opinion also shows that there was work performed on the disputed portion of Darr Road. The trial court discusses expenditures of $100 and $50 in 1905 and 1916, respectively, construction of a bridge over a drain in 1919, graveling (laying of gravel) in 1958, and work performed in 2001 to bulldoze and clear stumps. Additionally, the trial court accepted testimony that the road was inspected annually by the MCRC. See App. 36-37 of the Petition. The trial court also discusses the public's use of the road in question in some detail at Petitioners' App. 37-44.

The Petitioners rely on *Texaco, Inc. V. Short*, 454 U.S. 516 (1982) to support its contention that the notice provided by the MCRC pursuant to the statute was insufficient. In *Texaco*, this Court reviewed a dormant minerals statute from the state of Indiana and found in pertinent part that property owners' interests in minerals were not extinguished without notice when owners were given a two-year grace period in which to gain familiarity with the statute and when the owners were presumed to have familiarity with the requirements of the statute.

The *Texaco* case does have some relevance in this matter, but does not support Petitioners' contention that there was insufficient notice in the public use and work associated with the creation of Darr Road through highway by user. In fact, the Appellants in *Texaco* did not challenge the sufficiency of their notice pursuant to the Act; rather, they claimed that lack of a specific notice of some type vitiated the self-executing feature of the Act. *Texaco* at 536. This Court added that "[w]e think it follows inexorably that the State may impose on him the lesser burden of keeping informed of the use or nonuse of his own property." *Texaco* at 538.

The *Texaco* case does not deal with the notice required to support a self-executing statute such as the Indiana dormant minerals act or the Michigan highway by user statute. As such, it is of little support to Petitioners, and in fact suggests that even in light of a self-executing statute, the landowner must be vigilant as to the uses of his property. In the matter at bar, under the facts adopted by the trial court, such vigilance would have resulted in observation of significant public use and work over the years by Petitioners and his predecessors in title. Petitioners concede that a self-executing statute, like MCL 221.20, does not violate due process on its face. Petitioners challenge whether the facts of this case support the requirement of notice. While Petitioners may disagree with the lower courts on this issue (which, of course, the lower courts did not address), this court will not typically grant certiorari for misapplication of facts to properly stated law. Rule 10. As such, there is no compelling reason to grant this petition.

IV. CONCLUSION

Petitioners have brought to this Court an issue not raised in the lower courts. Given same, and the fact that the lower courts found sufficient work and use of the subject road to substantiate the self-executing aspects of Michigan's highway by user statute, any review of this matter would be tantamount to a determination of whether the lower courts erroneously applied the facts. As such, the petition is without merit and should be denied.

Respectfully submitted,

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